KOPERASI DOKTOR MALAYSIA BERHAD A

v.

DR RAJAMOHAN ANNAMALAI & ORS

COURT OF APPEAL, PUTRAJAYA B
CLEMENT SKINNER JCA
ALIZATUL KHAIR OSMAN JCA
ROHANA YUSUF JCA
[CIVIL APPEAL NO: W-02-766-04-2012]
3 DECEMBER 2013 C

UNINCORPORATED ASSOCIATIONS: *Societies - Co-operative society - Healthcare business scheme - Dividends received not payable in cash to members - Additional dividend to be paid in form of medicine - Approval of scheme during annual general meeting - Whether breached art. 13 Federal Constitution - Profits distributed under scheme - Whether a patronage rebate - Conditions to be adhered to - Whether there was forfeiture of transfer of dividend - Rights of members to be decided at general meeting - Co-operative Societies Act 1993, s. 36* D

The appellant was a co-operative society whose members consist of doctors in private practice. In 2008, the appellant proposed a healthcare business scheme ('the scheme') to benefit its members by providing them with affordable medicine and supplies that could be sold to the public for a reduced rate. To implement the scheme, it was proposed that a wholesale business would be set up to supply pharmaceutical products to the appellant's members at competitive prices and at the same time, to establish a business for the appellant. The ordered drugs would be delivered directly to the doctors and with three months credit limit. In brief, the salient features of the scheme, *inter alia*, were (i) to set up a business called KDM Pharma which was wholly-owned by the appellant; and (ii) to declare additional dividends of 20% for the appellant's members. These additional dividends were not payable in cash to the members and it must be utilised to purchase the equivalent value-in-cash of pharmaceutical products obtained and supplied by the appellant for the benefit of its members. During the appellant's annual general meeting ('AGM') in 2008, a resolution to set up KDM Pharma was passed. Further, the Co-operatives Commission of Malaysia ('CCM') approved the E F G H I

A additional dividend to be paid in the form of medicine by KDN Pharma. The respondents, however, disagreed with the scheme by stating that it would not be practical for them to buy medicines from KDM Pharma and requested for the additional dividends to be paid in cash. On 7 June 2009, the members of the appellant
B at the AGM once again approved the scheme for the following year based on an additional dividend of 15%. Dissatisfied with the implementation of the scheme, the respondents lodged a reference to the tribunal and sought for an order that the additional dividends be paid to them in cash. The issue before the tribunal
C was whether the appellant could withhold the payment of dividends which were rightly due to the members of the appellant in the event the members such as the respondents did not wish to purchase the pharmaceuticals or did not purchase them for various personal reasons. The tribunal ruled in favour of the
D respondents by deciding, *inter alia*, that (i) the scheme was unconstitutional as it breached art. 13 of the Federal Constitution (no person shall be deprived of property save in accordance with law); and (ii) neither the Co-operative Societies Act 1993 ('the Act'), regulations or by-laws passed under it had authorised the
E creation of the impugned scheme. On an application for judicial review, the High Court upheld the decision of the tribunal and hence, this appeal.

Held (allowing appeal; setting aside decision of the High
F **Court)**

Per Clement Skinner JCA delivering the judgment of the court:

(1) Section 57(5) of the Act provides that a co-operative society such as the appellant may utilise its audited net profits for all
G or any of the purposes stated therein which includes the payment of rebate on patronage and the payment of dividend. The proposal for the scheme and the percentage of profits that was to be distributed was duly approved at the 2008 and 2009 AGM. This complied with reg. 12(1)(ja) made under the
H Act and the rate of dividend at 20% and 15% respectively were duly approved by the CCM as required by reg. 24. (para 29)

I

(2) The 20% and 15% of profits distributed under the scheme was not a patronage rebate. According to, *inter alia*, the appellant's by-laws, a member had to do business with a co-operative society before there can be a share of profits paid to the member as a rebate on patronage. This is because the share of profit paid to the member was worked out in proportion of the volume of business the member had done with the co-operative society and from which a profit had been derived. There was no evidence that any of the members of the appellant had done any business with the appellant for which a 20% and 15% patronage rebate could be paid to them within the meaning of that term in 2008 and 2009. (para 32)

(3) The question of forfeiture of transfer of the dividend did not arise as the members at the annual general meeting had decided that the 20% and 15% dividend was not to be distributed in cash to the individual member but paid to KDM Pharma. The rights of the members to so decide at a general meeting of the appellant was provided under s. 36 of the Act which states that the ultimate authority of a co-operative society shall vest in the general meeting of its members. (para 35)

(4) In order to invoke the protection under art. 13 of the Federal Constitution, either one or both of the parties to the dispute must be the State (*Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor*; refd). This is because art. 13 is a protection against deprivation of property by the State, save as in accordance with the law. On the facts, the tribunal erred when it likened the payment of a dividend to ownership of property which attracted the constitutional protection under art. 13. The tribunal had committed a jurisdictional error or an error of law in the wider sense as described in *Anisminic Ltd v. Foreign Compensation Commission* when it handed down its award, which should have been quashed by the High Court. (paras 36 & 38)

Bahasa Malaysia *Translation Of Headnotes*

Perayu merupakan sebuah koperasi di mana ahli-ahlinya adalah doktor-doktor swasta. Pada tahun 2008, perayu mencadangkan satu skim perniagaan kesihatan ('skima tersebut') untuk memberi faedah kepada ahli-ahlinya dengan menyediakan ubatan yang boleh dijual kepada orang awam, dengan harga yang rendah. Untuk

melaksanakan skim tersebut, ia dicadangkan bahawa satu perniagaan borong akan ditubuhkan untuk mengedar produk farmaseutikal kepada ahli-ahli perayu pada harga kompetitif dan pada masa yang sama, untuk menubuhkan satu perniagaan bagi perayu. Ubatan yang ditempah akan dihantar secara terus kepada doktor-doktor dengan had kredit tiga bulan. Secara ringkasnya, ciri-ciri penting skima tersebut, antara lain, adalah (i) untuk menubuhkan sebuah perniagaan yang dikenali sebagai KDM Pharma yang dimiliki sepenuhnya oleh perayu; dan (ii) untuk mengisytiharkan dividen tambahan sebanyak 20% bagi ahli-ahli perayu. Dividen tambahan ini tidak dibayar secara tunai kepada ahli-ahlinya dan perlu digunakan untuk membeli nilai tunai setara dengan produk farmaseutikal yang disediakan oleh perayu bagi faedah ahli-ahlinya. Semasa mesyuarat agung tahunan ('AGM') perayu pada tahun 2008, satu resolusi untuk menubuhkan KDM Pharma telah diluluskan. Tambahan lagi, Suruhanjaya Koperasi Malaysia ('SKM') telah meluluskan dividen tambahan untuk dibayar dalam bentuk ubat-ubatan oleh KDM Pharma. Responden-responden, walau bagaimanapun, tidak bersetuju dengan skim tersebut dengan menyuarakan ia tidak praktikal untuk membeli ubat-ubatan daripada KDM Pharma dan meminta supaya dividen tambahan itu dibayar secara tunai. Pada 7 Jun 2009, semasa AGM, ahli-ahli perayu sekali lagi meluluskan skim tersebut pada tahun berikutnya berdasarkan dividen tambahan sebanyak 15%. Tidak berpuas hati dengan pelaksanaan skim tersebut, responden-responden telah membuat rujukan kepada tribunal dan memohon untuk perintah bahawa dividen tambahan dibayar kepada mereka dalam bentuk tunai. Isu yang dibangkitkan di tribunal adalah sama ada perayu boleh menahan bayaran dividen yang layak diberi kepada ahli-ahli perayu di mana ahli-ahlinya seperti responden-responden tidak berminat untuk membeli barangan farmaseutikal ataupun tidak membelinya untuk alasan-alasan peribadi. Berpihak kepada pihak responden, tribunal memutuskan, antara lain, bahawa (i) skim tersebut tidak berperlembagaan memandangkan ia mengingkari perkara 13 Perlembagaan Persekutuan (tiada seorang pun boleh dilucutkan hartanya kecuali mengikut undang-undang); dan (ii) Akta Koperasi 1993 (Akta), peraturan atau undang-undang kecil yang diluluskan di bawahnya tidak mengiktiraf pembentukan skim tersebut. Atas permohonan untuk semakan kehakiman, Mahkamah Tinggi telah mengesahkan keputusan tribunal dan oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 57(5) Akta memperuntukkan bahawa suatu koperasi seperti perayu boleh menggunakan keuntungan hasil bersih yang telah diaudit bagi kesemua atau sebarang kehendak yang dinyatakan di situ termasuk bayaran rebat atas naungan dan bayaran dividen. Berdasarkan fakta, cadangan untuk skim dan peratus keuntungan yang sepatutnya diagihkan telah pun diluluskan semasa AGM pada tahun 2008 dan 2009. Ini mematuhi peraturan 12(1)(ja) yang dibuat di bawah Akta dan dividen sebanyak 20% dan 15% masing-masing telah pun diluluskan oleh SKM seperti dikehendaki di bawah per. 24.

(2) Keuntungan 20% dan 15% yang diagihkan di bawah skim tersebut bukanlah satu rebat naungan. Menurut, undang-undang kecil perayu, seorang ahli perlu membuat perniagaan dengan koperasi sebelum sebahagian daripada keuntungan boleh dibayar kepada ahli itu sebagai rebat penaungan. Ini adalah kerana bahagian keuntungan yang dibayar kepada ahli itu ditentukan melalui pembahagian jumlah perniagaan ahli tersebut yang dibuat dengan koperasi dan di mana keuntungan telah pun diperolehi. Tiada keterangan yang menunjukkan bahawa mana-mana ahli perayu telah membuat perniagaan dengan perayu di mana 20% dan 15% rebat penaungan boleh dibayar kepada mereka berdasarkan pengertian terma tersebut pada tahun 2008 dan 2009.

(3) Persoalan mengenai perlucuthakan pindahmilik dividen tidak berbangkit memandangkan ahli-ahli mesyuarat agung tahunan telah memutuskan bahawa 20% dan 15% dividen tidak boleh diagihkan dalam bentuk tunai kepada ahli individu tetapi dibayar kepada KDM Pharma. Hak ahli-ahli untuk memutuskan sebegitu semasa mesyuarat agung perayu dibenarkan di bawah s. 36 Akta yang memperuntukkan bahawa kuasa mutlak koperasi terletak dalam mesyuarat agung ahli-ahlinya.

(4) Untuk menggunakan perlindungan di bawah per. 13 Perlembagaan Persekutuan, salah satu ataupun kedua-dua pihak kepada pertikaian itu mestilah merupakan kerajaan (*Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor*; dirujuk). Ini adalah kerana per. 13 adalah suatu perlindungan

terhadap penafian harta oleh kerajaan, kecuali mengikut undang-undang. Tribunal khilaf apabila ia menyamakan bayaran dividen kepada pemilikan harta yang menarik perlindungan perlembagaan di bawah per. 13. Dalam erti kata luas, tribunal telah melakukan suatu kesilapan bidangkuasa atau kesilapan undang-undang seperti dinyatakan dalam *Anisminic Ltd v. Foreign Compensation Commission* apabila ia menyampaikan awardnya, yang sepatutnya dibatalkan oleh Mahkamah Tinggi.

Case(s) referred to:

Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147 ***(refd)***
Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor [2004] 4 CLJ 403 CA ***(refd)***
Malayan Banking Bhd v. PK Rajamani [1994] 2 CLJ 25 SC ***(refd)***
NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***

Legislation referred to:

Co-operative Societies Act 1993, ss. 2, 23, 36, 54, 57(5), 59
Co-operative Societies Regulations 1995, reg. 12(1)(ja), 24
Federal Constitution, art. 13

For the appellant - V Jaya Kumar (Anton Paiva with him); M/s Kanesalingam & Co
For the respondents - Kevin Joshua (Farhana Yaacob with him); M/s Kevin & Co

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R1-25-29-2011]

Reported by Kumitha Abd Majid

JUDGMENT

Clement Skinner JCA:

Introduction

[1] We had earlier allowed the appeal of Koperasi Doktor Malaysia Berhad ("the appellant"), against the decision of the High Court, Kuala Lumpur dated 3 April 3012 which had upheld the decision of the Co-Operative Societies tribunal ("the tribunal") of 4 January 2011. By its decision the tribunal had on a reference made to it by (i) Dr Rajamohan Annamalai; (ii) Dr Subla Rajamohan and (iii) Datuk Dr P Krishnan a/l Pakkirisamy ("the respondents") made an order in the following terms:

Tribunal Koperasi ini dengan sebulat suara memutuskan bahawa ketiga-tiga Pemohon adalah berhak kepada keseluruhan dividen yang telah diiisytiharkan oleh Responden (Koperasi Doktor Malaysia Berhad) termasuk jumlah yang telah diluluskan oleh SKM (Suruhanjaya Koperasi Malaysia) untuk dibayar kepada KDM Phama. tribunal Koperasi Malaysia dengan ini, mengarahkan supaya keseluruhan jumlah yang dirampas (forfeited) dari akaun KDM Phama kepunyaan ketiga-tiga Pemohon ini dibayar balik kepada mereka masing-masing mengikut jumlah yang telah dirampas.

[2] These are our reasons for allowing the appeal.

Facts

[3] The appellant is a co-operative society whose members consist of doctors in private practice. In year 2008 the appellant proposed to its members a healthcare business scheme to benefit the members by providing them with affordable medicine and supplies that can be sold to the public for a reduced rate (the scheme). To implement the scheme it was proposed to set up a wholesale business in pharmaceutical products to supply wholly to the appellant's members at competitive prices and at the same time establish a business for the appellant. The ordered drugs will be delivered directly to the doctors by using courier services and with three months credit limit.

[4] The salient features of the scheme were:

(i) to set up a business called KDM Pharma which is wholly owned by the appellant;

(ii) to declare "additional dividends" of 20% for the appellant's members;

(iii) the additional dividends are not payable in cash to the members;

(iv) the additional dividends must be utilised to purchase the equivalent value-in-cash of pharmaceutical products obtained and supplied by the appellant for the benefit of members;

(v) the prices of the pharmaceutical products would be lower than that available in the market;

(vi) if the members did not utilise their additional dividends to purchase the pharmaceutical products within a given period of say three months, the amount would be paid back into the appellant's share fund.

[5] On 8 June 2008 the appellant presented to the delegates attending the annual general meeting (DAGM) a resolution to be voted on regarding the setting up of KDM Pharma. The extract of the appellant's annual report for 2008/2009 at tab 4 of the appellant's core bundle shows that "after a lengthy discussion the house unanimously passed" the resolution.

[6] At the same meeting the treasurer also proposed the approval of the following items as "proposed income appropriated for the year ended 31 December 2007":

APPROPRIATION	RM
Provision for Income Tax	1,901,368.59
Proposed Dividend (RM6,957.757) - 60%	4,174,654.59
Proposed KDM Pharma (RM6,957.757) - 20%	1,391,551.40
Provision for BOD Honorarium	30,000
Provision for KDM Project	65,000
...	...
...	...
...	...

	7,755,064.19

The record shows that the income appropriation statement for year ended 31 December 2007 was duly adopted by the meeting.

[7] On 3 November 2008 the appellant wrote to the Cooperatives Commission Malaysia or Suruhanjaya Koperasi Malaysia ("SKM") for approval to declare RM1,391,551.40 as 20% additional dividend to be paid in the form of medicine by KDM Pharma. On 24 December 2008 the SKM approved the additional dividend. The appellant's members were then informed about the scheme and their entitlements.

[8] The respondents wrote back to the appellant disagreeing with the scheme and giving their reasons why it would not be practical for them to buy medicine from KDM Pharma. The third respondent requested for the additional dividends to be paid in cash to him.

[9] On 7 June 2009 the members of the appellant at the DAGM once again approved the scheme for the following year based on an additional dividend of 15%.

[10] Being dissatisfied with the implementation of the scheme the respondents lodged a reference to the tribunal and sought for an order that the additional dividends be paid to them in cash.

The Tribunal's Decision

[11] The tribunal ruled in favour of the respondents. The tribunal identified the issue before it in this way:

> Tiada fakta yang dipertikaikan dalam kes ini. Apa yang dipertikaikan dalam kes ini adalah isu sama ada kesemua Pemohon berhak dibayar dividen mereka dengan sepenuhnya berasaskan kepada jumlah syer yang dimiliki oleh mereka ataupun KDM mempunyai kuasa untuk membayar sebahagian daripada dividen tersebut ke dalam KDM Pharma bagi tujuan digunakan khas oleh kesemua Pemohon untuk membeli ubat-ubatan yang dibekalkan oleh KDM Pharma.

[12] In arriving at its decision, this is what the tribunal found (at para. 30 of its award:

> Dalam kes ini, Responden memang berhasrat untuk menjayakan KDM Pharma dan salah satu cara adalah untuk mempastikan bahawa semua anggota membeli ubat-ubatan daripadanya. Akan tetapi, walaupun Responden ikhlas dalam usahanya, berdasarkan kepada prinsip undang-undang ini, Tribunal Koperasi ini dengan sebulat suara mendapati bahawa memang tiada apa pun peruntukan di dalam UUK (undang-undang kechil) yang membenarkan Responden mengagihkan dividen tersebut iaitu harga anggota individu kepada pihak yang lain dan tiada juga peruntukan di dalam UUK yang membenarkan Responden menghapuskira, merampas atau mengambil kembali dividen yang telah diisytiharkan sebagai hak dan kepunyaan seseorang anggota ke dalam dananya sendiri. Maka, Tribunal Koperasi ini dengan sebulat suara memutuskan bahawa Responden tiada mempunyai hak merampas, menghapuskira atau mengambil kembali dividen yang tidak digunakan oleh anggota-anggotanya di dalam KDM Pharma.

[13] The tribunal further held that the scheme was unconstitutional as it breached art. 13 of the Federal Constitution ie, no person shall be deprived of property save in accordance with law.

The High Court Decision

[14] The appellant sought a judicial review of the tribunal's award at the High Court. The learned High Court Judge refused to quash the award of the tribunal. The High Court held that there was no legal basis for the appellant to impose the impugned scheme on its members and that the tribunal was correct in holding that neither the Co-operative Societies Act 1993 nor the regulations or by laws passed under it had authorised the creation of the impugned scheme. Further the learned judge agreed with the tribunal that the scheme had contravened art. 13 of the Federal Constitution.

This Appeal

[15] Before us it was contended on behalf of the appellant that the High Court had erred in holding that there was no legal basis for the scheme. According to the appellant the scheme was a means by which the appellant was sharing its profits with its members, and there was legal basis for the same. Under the Co-operative Societies Act 1993 ("the Act"), s. 57(5) provides that subject to certain restrictions which are not relevant to this dispute, a co-operative society may utilise the audited net profits for each financial year for, *inter alia*, (a) the payment of rebate on patronage and (b) the payment of dividend on the shares of members.

[16] The appellant drew attention to s. 2 of the Act which defines "patronage rebate" to mean "a share of profits of a co-operative society divided among its members in proportion to the volume of business done with the co-operative society by them from which such profits were derived".

[17] With regard to the resolution passed unanimously at the DAGM of 2008 to set up KDM Pharma to undertake the wholesale business in pharmaceutical products to supply to the appellant's members at competitive prices, the appellant submitted that this was a perfectly legitimate decision as the by-laws of the appellant states that the objective of the appellant is to increase

the economic interests of its members in accordance with co-operative principles, while the purpose of the appellant is to implement business and services in medical and health fields. This objective and purpose is expressly stated in by-law 6 and 7 of the appellant.

[18] As far as the profits of the appellant are concerned, by-law 65(2) authorizes that after the statutory deductions mentioned there, the balance of net profits may be utilised for, *inter alia*, payment of rebate on patronage and the payment of dividends.

[19] With regard to the Co-operative Societies Regulations 1995 ("the regulations") it is the submission of the appellant that by reg. 12(1)(ja) the appellant may at its general meeting consider and approve the distribution of profits, and, by reg. 24, the rate of dividend paid on shares shall not exceed ten per centum per annum except with the approval of the Registrar-General which is not in issue here as the DAGM of 2008 and 2009 did approve the distribution of profits and the SKM has approved the payment of 20% and 15% dividends respectively for 2008 and 2009.

[20] The appellant accordingly contended that there was nothing unlawful or "*ultra vires*" about the scheme. It is the appellant's submission that the scheme is in effect a form of "patronage rebate" as defined in the Act as well as in the by-laws of the appellant.

[21] The appellant also submitted that even though it had not fought the case before the tribunal and at the High Court on the basis that the scheme was a form of patronage rebate, which was being raised for the first time at this appeal stage, the appellant submitted that whether the scheme is a 'patronage rebate' within the meaning described in s. 2 of the Act is a question of law, which the appellant should not be precluded from taking at this stage of the proceedings. The appellant also submitted that even though the word "dividend" was used in documents, and by the officers of the appellant during the hearing before the tribunal, this would make no difference to the interpretative jurisdiction of this court as the correct approach would be to look at the substance, not just the label which had been attached by the parties, since the law will look beyond the terminology of the document to the

actual facts of the situation and it is no longer a question of words but substance (see *Malayan Banking Bhd v. PK Rajamani* [1994] 2 CLJ 25; [1994] 1 MLJ 405 at 410 SC); and the construction of a written document is a question of law for the court and not by witnesses through their oral evidence (see *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96; [2004] 3 MLJ 38 at p. 44 CA). The appellant accordingly submitted that its appeal should be allowed.

[22] The respondents on their part contended that the tribunal and the High Court were entirely right in their conclusions that there was no legal basis for the scheme.

[23] The respondents also submitted that the appellant had never presented the scheme as a "rebate on patronage" to the DAGM when approval for the scheme was being sought, and also when the case was before the tribunal and the High Court. Therefore the appellant should not be allowed to take the point.

[24] The respondents further submitted that the issue before the tribunal was whether the appellant could withhold the payment of dividends which were rightly due to the members of the appellant in the event the members such as the three respondents do not wish to purchase the pharmaceuticals or did not purchase them for various personal reasons.

[25] According to the respondents the scheme ran counter to s. 23 of the Act which stipulates that the shares of a member shall not be liable to attachment or sale under any decree or order of a court in respect of any debt, which is what the appellant was trying to do when it "forfeited" the member's unused dividend held by KDM Pharma.

[26] The respondents also contended that the scheme was contrary to s. 54 of the Act which states that a co-operative society may invest its surplus funds only in certain approved and designated securities, which the scheme did not qualify as.

[27] The respondents further contended that in proposing the scheme the appellant had breached s. 59 of the Act when it failed to submit its accounts and balance sheet to the members.

Our Decision

[28] Having considered the submissions of the parties, we allowed the appeal for the following reasons.

[29] Leaving aside for one moment the issue of whether the scheme was a "patronage rebate" or a dividend payment, in our judgment there clearly was a legal basis for the implementation of the scheme. The Act itself provides in s. 57(5) that a co-operative society such as the appellant may utilise its audited net profits for all or any of the purposes stated therein which includes the payment of rebate on patronage and the payment of dividend. Here the proposal for the scheme and the percentage of profits that was to be distributed was put to the members at the DAGM of 2008 and 2009 and duly approved. This complies with reg. 12(1)(ja) made under the Act, and the rate of dividend at 20% and 15% respectively were duly approved by the SKM as required by reg. 24.

[30] With regard to the setting up of KDM Pharma to participate in the pharmaceutical business in implementing the scheme, we find the decision to do so falls within the objective and purpose expressed in by-law 6 and 7 of the appellant.

[31] With regard to the question whether the appellant should be allowed to take the point that the scheme is a kind of "patronage rebate", in our view since the issue relates to the interpretation of the relevant provisions in the Act and the by-laws of the appellant, which is essentially a question of law the appellant should not be precluded from taking the point.

[32] Reverting now to the question of whether the 20% and 15% of profits distributed under the scheme was a "patronage rebate" or a dividend payment, in our judgment it was not a patronage rebate. According to the meaning of those words in the Act as well as the appellant's by-laws, a member has to do business with a co-operative society before there can be a share of profits paid to the member as a "rebate on patronage", since the share of profit paid to the member is worked out in proportion of the volume of business the member has done with the co-operative society and from which a profit has been derived. Here there was no evidence that any of the members of the appellant had done

any business with the appellant for which a 20% and 15% "patronage rebate" could be paid to them within the meaning of that term in 2008 and 2009.

[33] In our judgment the 20% and 15% represented a utilisation of the net profits for payment of dividend and this accords with the evidence that in the documents as well as at the hearing before the tribunal, the members were informed that the 20% and 15% represented "additional dividends". This is also mentioned in the letter written to SKM for approval of such rates.

[34] Having said that, in our judgment even though the 20% and 15% were declared as additional dividends, they were not a dividend payable in cash to the members. The members of the appellant including the respondents could not have been under any misapprehension that the dividend was not payable in cash because it is very clear from the annual report of the appellant for 2008 to 2009 found at pp. 462 and 463 of record of appeal vol. 2(6) part C, that from the sum of RM7,755,944.19 available for appropriation from profits as at 31 December 2007, a sum of RM6,957,757 was proposed for appropriation as dividend. Out of that sum, a sum of RM1,391,551.40 or 20% of RM6,957,757.19 would be paid to KDM Pharma. Clearly in our view by proposing that 20% or RM1,391,551 be appropriated from profits as dividend for the purpose of payment to KDM Pharma, it was a clear indication to members that the 20% dividend was not to be distributed in cash to each member but to be paid to KDM Pharma under the scheme. The proposal was duly adopted at the DAGM.

[35] If the members present at the annual general meetings at which the proposal to distribute 20% and 15% dividend respectively to KDM Pharma was made, found that such proposal was not acceptable to them, they could have decided against it. It is for this reason that we do not agree with the decision of the tribunal that the individual member's right to receive the dividend duly declared by the appellant is a personal right which cannot be forfeited or transferred to anyone else without the member's consent. In our view the question of forfeiture of transfer of the dividend did not arise as the members at the annual general meeting had decided that the 20% and 15% dividend was not to

be distributed in cash to the individual member but paid to KDM Pharma. That it was well within the right of the members to so decide at a general meeting of the appellant is provided for in s. 36 of the Act which states that the ultimate authority of a co-operative society shall vest in the general meeting of its members.

[36] The tribunal had also likened the payment of a dividend to ownership of property which attracts the constitutional protection housed in art. 13 of the Federal Constitution. This is not correct as it has been held by the Federal Court in *Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor* [2004] 4 CLJ 403; [2004] 4 MLJ 466 at p. 469 that to invoke the protection of art. 13, either one or both the parties to the dispute must be the State. This is because art. 13 is a protection against deprivation of property by the State, save as in accordance with law. This is clearly not the case here.

[37] With regard to the respondent's contention that the scheme contravened ss. 23, 54 and 59 of the Act, we find that there is no substance in the contention. Section 23 relates to "attachment or sale under any decree at order of a court" of a member's share. The facts of this case shows that s. 23 has no relevance to the present dispute. Section 54 relates to investing in "surplus funds" and in what "securities" such funds may be invested in. This is not a case of the appellant trying to invest its surplus funds in such securities and hence the section is irrelevant to this dispute. Section 59 relates to the laying of the appellant's "trading and profit and loss account" at its annual general meeting. This was complied with for the year ending 31 December 2008.

[38] It was for all the above reasons that we found the tribunal had committed a jurisdictional error or an error of law in the wider sense as described in the case of *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 when handing down its award, which should have been quashed by the High Court. We accordingly allowed the appeal, ordered that the award of the tribunal be quashed and the decision of the High Court be set aside. We also ordered that the payments made to the respondents be refunded to the appellant within 30 days.